AMSEL-LG February 25, 1998

MEMORANDUM FOR Chief Counsel

SUBJECT: A Labor Organization's Rights & Claims During Privatization

1. The purpose of this memorandum is to discuss the possible rights or claims that a labor organization may assert when a determination has been made to privatize a governmental activity. Specifically, it shall address a labor organization's rights or claims regarding the contracting out determination, impact and implementation rights, and the negotiability of a labor organization's contracting out proposals.

2. It is well established that management has the statutory authority to make substantive contracting out determinations. Such determinations have occasionally been challenged by labor organizations, either through the federal courts or before the Federal Labor Relations Authority (hereinafter "FLRA"), often on the basis that an agency has failed to comply with applicable laws pertaining to privatization. Whether federal courts have jurisdiction over such issues or whether labor organizations have standing to bring such suits is not yet resolved. More frequently, labor organizations will request to negotiate contracting out proposals on the basis of their impact and implementation rights due to changes affecting conditions of employment. Generally, these proposals will be considered appropriate for negotiation provided they do not excessively interfere with management rights. Therefore, it is likely that after a determination has been made to privatize there will be a request from a labor organization to negotiate some impact and implementation matters. A discussion of these issues follows.

3. The Federal Service-Management Relations Act, 5 U.S.C. § 7106 ***et. seq.*** (1998) (hereinafter "Mgmt. Relations Act"), specifies management rights concerning contracting out determinations. Specifically, it states that "nothing in this chapter [5 U.S.C. § 1701 ***et. seq.***] shall affect the authority of any management official of any agency…to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B) (1998) However, this same section also establishes a labor organization's right to negotiate implementation of procedures and appropriate arrangements for employees who are affected by management's exercise of statutory authority. The section states that "[n]othing in this section shall preclude any agency and any labor organization from negotiating…procedures which management officials of the agency will observe in exercising any authority under this section; or appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." 5 U.S.C. § 7106(b)(2)-(3) (1998) Furthermore, the Mgmt. Relations Act stipulates "the duty to bargain in good faith (by both parties), shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." 5 U.S.C. § 7117 (1998) Finally, the Mgmt. Relations Act defines a grievance as "any complaint…by an employee, labor organization or agency concerning…any claimed violation, misinterpretation or misapplication of army law, rule or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9) (1998).

4. The majority of cases which involve disputes between government agencies and labor organizations have centered upon the application of procedures under Office of Management and Budget Circular A-76 (hereinafter "Circular A-76"), which pertains to the Commercial Activities Program. Although Circular A-76 is not being used for privatization in the present privatization matter, the Circular A-76 cases are still important since many of the issues raised are applicable to the present situation. The Mgmt. Relations Act established that the substantive determination

to contract out is clearly within the purview of management, and is solely within management's discretion. However, labor organizations have sought to challenge such determinations via negotiated grievance procedures, discussed ***infra***, or by direct appeal to the federal courts under the Administrative Procedure Act (hereinafter "APA") 5 U.S.C. § 701 ***et. seq.*** (1988).

5. In National Federation of Federal Employees v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989), ***cert.denied***, 496 US 936 (1990), the court held that a labor organization lacked standing to bring suit under Circular A-76,and the National Defense Authorization Act. The court held that determinations to contract out work, are administrative, and are not reviewable under APA. Applying a "zone of interest" test, the court held that the purpose of Circular A-76, ((based upon its analysis of the Office of Federal Procurement Policy Act Amendments of 1979, as amended 41 U.S.C. § 401-420 (1998), and the Budget and Accounting Act of 1921, as amended 31 U.S.C. § 101 ***et. seq***. (1998)), was to rely on the private sector and to be economical. Id. at 1050. The court concluded that nothing in Circular A-76's legislative history seemed to provide any basis to bring a suit to challenge a contracting out determination to protect an employee's job. Furthermore, the court held that the purpose of Circular A-76 was to promote efficiency within government service, not to protect government jobs. This purpose directly conflicted with the employees' interest of retaining their jobs. Id. Therefore, the court concluded that Circular A-76's purpose was outside the "zone of interest" of the employees. Id. Accordingly, the court held that the employees did not have standing under APA. Finally, the court rejected the union's claim that it had standing based on its rejected bidder's status (since neither the union nor its members bid on the privatization contract). Id. at 1052. It should be noted that another decision held that the Service Contract Act, 41 U.S.C. § 351 ***et. seq.*** (1998), also may not be used by labor organizations to assert standing. National Maritime Union of America, ***et. al***. V. Military Sealift Command, ***et.al***, 824 F.2d 1228 (D.C. Cir. 1987).

6. However, since Cheney, the sixth circuit has held that the courts may review wrongful privatization cases under APA. Diebold v. U.S., 947 F.2d 787 (6th Cir. 1991), ***rehearing denied***, 961 F.2d 97 (1992). In this case the union alleged that the government had wrongfully calculated the cost comparison data in its contracting out determination. The court concluded that the matter may be reviewable in court under APA since a privatization decision would be an agency action within the meaning of APA. Id. at. 787. The court acknowledged that when no law exists, an agency action "is considered committed to agency discretion." Id. The court stated:

> [t]o decide this wrongful privatization case, we look first to the general procurement statutes, then to the statute dealing with DoD contracting-out and finally to the regulations issued pursuant to these statutes as sources of law and examine whether they create 'law to apply' and provide standards against which a court may judge whether an agency has complied with applicable law. Id. at 793.

The court held that failure to comply with requirements of a cost comparison "could support a claim that the agency was not complying with statutory directives to pursue economy and efficiency and to contract out commercial activities if contracting out will cost less than in house production - the law to be applied." Id. at 801-2. The court concluded that "wrongful privatization cases under procurement statutes and regulations like Circular A-76 are basically accounting cases. Courts have long dealt with disputes that required an accounting of one party or the other. Otherwise the cases are like other administrative review cases…Faulty cost comparisons, whether favoring bidders or in-house estimates, are contrary to the legislation governing procurement decisions." Id. at 810. Therefore,

the court held since there are statutes and regulations regarding contracting out or privatization and thus "there is law to apply" and these actions are reviewable under APA. Id. Cheney was not addressed by the court because it did not reach the issue of whether there the labor organization had standing and remanded this determination to the lower court. Id. The court's failure to discuss Cheney is discussed at length in the dissenting opinion. Id. at 811-813 (Wellford, J., dissenting)

7. The standing issue has been more recently addressed in National Air Traffic Controllers Association v. Federico Pena, ***et.al***., 944 F. Supp. 1337, (N.D. OH 1996). The labor organization alleged the government violated the Circular A-76 because of the following reasons: the government was contracting out an inherently governmental function; impairing the national defense by giving up air traffic control responsibilities; improperly waiving a cost comparison; and failing to meet the cost/benefit requirements of the Circular A-76. The plaintiffs sought a declaration that the privatization decision was unlawful, as well as an injunction against implementation of the privatization. The court held that the association had standing under Article III of the United States Constitution to bring this issue before it. The court did not address whether it had the authority to review the decision. To establish standing the court held an individual plaintiff must demonstrate:

> (1) that he or she has suffered an "injury in fact";
>
> (2) that there is a causal connection between the injury and conduct complained of; and
>
> (3) that it is likely that the injury will be redressed by a favorable decision. Id. at 1342.

Additionally, an organization of such individuals suing on behalf of its members must meet these additional requirements; they must demonstrate:

> (a) its members would otherwise have standing to sue in their own right;
>
> (b) the interests it seeks to protect are germane to the organization's purpose; and
>
> (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. Id. at. 1346.

In Pena, the court found that the labor organization met all such requirements. Additionally, the court found that even though some members may have not lost their jobs yet, the loss of their jobs was "impending" and therefore the issue did not fail the test of ripeness. Id. at 1347. Based on the foregoing the Court ruled that the labor organization had standing to challenge an agency's contracting out determination.

8. Although the cases brought before the federal court were based on Circular A-76 contracting out determinations, these cases may still be relevant to non-Circular A-76 privatization determinations. The cases above discussed whether the federal courts had jurisdiction over wrongful contracting out determinations, as well as whether labor organizations had standing to bring such actions. If a labor organization may argue that the manner in which an agency complied with Circular A-76 was incorrect, then it is likely that a labor organization may argue that the failure to use Circular A-76, the Commercial Activities Program, is itself a violation of law and thus a wrongful privatization. Therefore, there is a risk that a labor organization may request review by the federal courts of a non-Circular A-76

privatization action, as well as an injunction to prevent such privatization. Additionally, the attempts by labor organizations, discussed ***infra***, to contest contracting out determinations via the provisions of the Mgmt. Relations Act, should also be considered as a potential avenue where labor organizations may attempt to contest such determinations.

9. Another basis that labor organizations have used to contest contracting out determinations is to base their claims on the Mgmt. Relations Act provisions. These provisions provide that the union has bargaining rights and that the union may "grieve violations, misinterpretations or misapplications of any law, rule or regulation affecting conditions of employment." 5 U.S.C. § 7121 (1998). One of the most important cases in this area is Dept. of the Treasury, IRS v. FLRA, 494 US 922 (1990), which dealt with a union proposal to use its negotiated grievance procedure as the Circular A-76's administrative appeals process. The IRS refused to bargain over this proposal claiming its subject matter was nonnegotiable because it was a management right. 5 U.S.C. § 7106 (1998). This proposal would have allowed contracting out determinations to be contested on the basis of grievance and arbitration provisions, rather than the required administrative appeals procedure which the Circular A-76 requires agencies to establish. The FLRA argued that bargaining rights regarding conditions of employees were not "trumped" by the management rights provisions of the Act. The Supreme Court held that the FLRA's position was "flatly contradicted by the language of § 7106(a)'s command that 'nothing in this chapter,'... nothing in the entire Act--shall affect the authority of agency officials to make contracting out determinations in accordance with applicable laws. Section § 7121 (Grievance Procedures) is among the provisions covered by that italicized language." Id. at 1627. The court further held that "section 7106A(a) says that insofar as union rights are concerned, it is entirely up to the IRS whether it will comply at all with Circular A-76's cost comparisons requirements, except to the extent that such compliance is required by an 'applicable law' outside the Act." Id. at 1629. The FLRA argued that Circular A-76 was an "applicable law" as referenced in § 7106(a)(2) so management was not excused from negotiating over grievance procedures. However, the court did not decide whether Circular A-76 was an applicable law, but instead remanded the decision to FLRA. Id. at 1629. Also, the court chose not to rule on whether the union's proposal was "inconsistent with the 'no arbitration language' in OMB Circular A-76 and therefore was nonnegotiable under § 7117" providing that the bargaining duty does not extend when it is inconsistent with Government-wide rules or regulations and federal law. Id.

10. Upon remand to the FLRA, in NTEU and Dept of Treasury, IRS, 42 FLRA 377 (1991), ***enforcement denied***, Dept. of Treasury, IRS v. FLRA, 996 F2d 1246 (D.C. Cir. 1993), the FLRA concluded that Circular A-76 was an "applicable law" and therefore was an appropriate matter for negotiation. This issue was once again revisited in the federal courts in Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. 1993). The court stated that "Employees...could challenge management's contracting-out authority only by seeking to enforce applicable laws." Id. at 1248. The court chose not to examine whether Circular A-76 was an applicable law, but instead stated that "assuming ***arguendo***, the Circular is an applicable law, it is also a government-wide rule or regulation under section 7117(a) of the Act....This section exempts from the duty to bargain any proposal inconsistent with a government-wide rule or regulation." Id. at 1250. The court further stated:

> We hold that if a government wide regulation under section 7117(a) is itself the only basis for a union grievance - that is, if there is no pre-existing legal right upon which the grievance can be based and the regulation precludes bargaining over its implementation prohibit grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation.

> When the government promulgates such a regulation it will not be hoisted on its own petard…Unllike the exemption in the management's rights section, the government-wide regulation exception to an agency's obligation to bargain is not conditioned by the need to bargain over 'appropriate arrangements.'" See 5 USC § 7117(a), Id. at 1252.

Therefore, the Court held that compliance with Circular A-76 is not a negotiable right under grievance procedures. The FLRA would eventually come to the same decision in AFGE Local 1345 and Dept. of Army, Fort Carson, 48 FLRA 1668 (1993). Specifically, the court held that the FLRA "adopt the Court's (previous decision in Dept. of Treasury, IRS v. FLRA) that Circular A-76 is a Government-wide regulation and that proposals subjecting disputes over compliance with the Circular to resolution under a negotiated grievance procedure are nonnegotiable. Previous decisions to the contrary will no longer be followed." Id. at 168.

11. One of the most important rights that a labor organization may assert concerning a contracting out determination are its impact and implementation rights. In Fort Carson, it was stated that these rights may not unnecessarily interfere or impose substantive limitations on management's right to contract out. Id. A labor organization may argue that a contracting out proposal is negotiable as an implementation, 5 U.S.C. § 7106(b)(2) (1998) or as an appropriate arrangement, 5 U.S.C. 7106(b)(3) (1998), for adversely affected employees. When examining proposals the court will examine whether they "establish substantive criteria governing the exercise of a management right which directly interferes with the exercise of that right." Id. The FLRA "has held when an agency makes a change affecting conditions of employment, even when it is privileged to make such a change, it is obliged to notify and, upon request, bargain with the collective bargaining representative of its employees concerning the impact and implementation change, when the foreseeable impact upon the unit employees is more than ***de minimis***." Dept. of the Army, ***et. al.*** v. NAGE Local R14-22, 1991 FLRA Lexis 386 (1991). When there is a right to negotiate the impact and implementation rights of a contracting out determination a labor organization must be given adequate prior notice. Id. The test for determining whether a proposal is an appropriate arrangement is whether the arrangement "excessively interferes with the exercise of management's rights." NAGE Local R14-87 & Kansas Army National Guard (KANG), 21 FLRA 24 (1986). The court further stated:

> In order to address this threshold question (whether the proposal is intended to be an arrangement) the union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. In other words, a union must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management right or rights. Id.

To determine whether the arrangement excessively interferes with management rights, the Authortiy shall examining such factors as:

> (1) What is the nature and extent of the impact experienced by the adversely affected employees, that is, what conditions of employment are affected and to what degree ?
>
> (2) To what extent are the circumstances giving rise to the adverse affects within an employee's control ?…

(3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, that is, what management right is affected; is more than one right affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved? ...

(4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement ?...and

(5) What is the effect of the proposal on effective and efficient government operations, that is, what are the benefits or burdens involved? Id.

These factors are not considered "all-inclusive." Id. Instead, "the totality of facts and circumstances" and relevant and appropriate considerations shall also be examined. Id.
For example, using such a test the Board has found that prohibiting management from contracting out for a period of one (1) year after the effective date would excessively interfere with management rights. Additionally, many aspects of the Reduction-In-Force process associated with contracting out determinations are negotiable. Dept. of Air Force v. NAGE Local R7-23, ***et. al.***, 35 FLRA 844 (1990).

12. Implementation rights concern the procedures which management officials may use when exercising their rights. Two tests, the use of which is dependent upon circumstances, are generally applied in regards to implementation rights: the "Acting At All" and "Direct Interference Test." The "Acting At All" test applies if a proposal is "purely procedural" and "looks to the agency's ability to act under a given proposal of a labor organization. If the agency is not prohibited from 'acting at all,' then it is possible the proposal does not affront the agency's exclusive management rights." Dept. of Interior v. FLRA, ***et. al.***, 873 F.2d 1505 (D.C. Cir. 1989) at 1507. The test for "Direct Interference" is whether the proposal directly interferes with an agency's exercise of its management rights. Dept of the Army. v. FLRA, ***et. al.***, 890 F.2d 467 (D.C. Cir. 1989). For example, a union proposal allowing an employee to provide documentation regarding legitimate use of drugs to the agency was considered negotiable and did not directly interfere with management's rights. Id.

13. Therefore, at a minimum, it is highly likely that the labor organization will request to negotiate certain proposals involving contracting out implementation and impact rights. In particular, it is likely that the labor organization will request to negotiate any resultant reductions in force caused by the contracting out determination and the manner in which they are conducted. For instance, the labor organization may request such things as negotiating the competitive area or retraining to be used in the reduction in force. Furthermore, as discussed below, the union may refer to its Collective Bargaining Agreement to enforce certain rights.

14. The Collective Bargaining Agreement between USAMC Central Systems Design Activity and the National Federation of Federal Employees, Local 1763, dated January 1990, contains some provisions which relate to "contracting out." Specifically, Article II, Management Rights and Obligations, Sec. 2, provides that the Employer has the right "to make determinations with respect to contracting out." This language basically mirrors the language of the Mgmt. Relations Act. Additionally, in Article XXVI, Sections 1-4, "Commercial Activities Program," the employer agrees to provide written notification to the Union when considering contracting out work currently performed by employees, as well as to provide briefings and consider the union's views and recommendations prior to proceeding with a contracting out decision. Furthermore, under this section, the union may request negotiation regarding the employees' reassignment and retraining to

minimize adverse impact. Finally, the union is allowed to present its views regarding any commercial activities cost studies. While the privatization in the present matter may not be under the auspices of the Commercial Activities Program, there is some risk that the union may attempt to use these provisions in any contracting out determination.

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